

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 139

**CHARLES M. THOMSON, TRUSTEE FOR PROPERTY OF
CHICAGO & NORTHWESTERN RAILWAY COMPANY; GEORGE
KIMBALL; ORDER OF RAILWAY CONDUCTORS;
AND BROTHERHOOD OF RAILROAD TRAINMEN,**

vs.

Petitioners,

BARNEY E. GASKILL, ET AL.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF.**

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Petitioners and Appellees Below,

vs.

BARNEY E. GASKILL, ET AL.,
Respondents and Appellants Below.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

*To the Honorable Charles Evans Hughes, Chief Justice
of the United States, and the Associate Justices of the
Supreme Court of the United States:*

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved.

This was an action at law brought in the United States
District Court for the District of Nebraska, Omaha Divi-

sion, by Barney E. Gaskill and forty other conductors and brakemen. All plaintiffs are employees of the Chicago & Northwestern Railway Company (hereinafter called C. & N. W.), on the Nebraska Division of the C. & N. W. The action was against Charles M. Thomson, Trustee for the C. & N. W. George Kimball, an employee of the C. & N. W. Sioux City Division, was "made a defendant here as a representative of said division, for the reason that the members vary and the names are unknown, so that he may if he so desires represent said Sioux City Division of Railway Trainmen and Conductors." (R. 4) Kimball was not sued as a representative of the employees of that division (R. 4, Par. 7), but merely invited to represent that division of the Brotherhoods. Because of this the District Court, on motion of the Railway Company, ordered the Brotherhoods to be made parties defendant (R. 15), and they came in and assumed positions adverse to respondents to defend the integrity of their agreements with the managements of both railroads.

The plaintiffs, who are now the respondents, sought separate and independent money judgments against their employer, the C. & N. W., for damages resulting from the alleged failure to allot the work on certain interrailroad runs between Omaha, Nebraska, and Sioux City, Iowa, in accordance with alleged seniority on trackage between California Junction, Iowa, and Omaha, Nebraska, claimed under collective bargaining agreements between the employer and the two Railroad Brotherhoods, demanding an accounting and that the C. & N. W. "be compelled to recognize plaintiffs' seniority rights in said work by the Sioux City Division * * *" (R. 7).

The question involved is whether the District Court was right in dismissing respondents' petition for want of jurisdiction. The petition alleged diversity of citizenship and that more than \$3,000.00 was involved as to each plaintiff.

Petitioners challenged the allegations as to jurisdictional amount involved by motion to dismiss, supported by affidavits of fact disproving those allegations of the petition (R. 16, 19, 35 and 36).

None of the exceptions in Sec. 24 of the Judicial Code, Sec. 41, Title 28, U. S. C. A., apply here, and hence the District Court was without jurisdiction if the requisite jurisdictional amount was not involved.

The District Court refused to proceed further until the jurisdictional questions were tried out, and required the parties to submit evidence in such form as they chose (R. 25).

This evidence established the earnings possible from the various portions of the runs in question (R. 45-46, 52-53) and the facts as hereinafter summarized.

Both lower courts held that the evidence established that no individual respondent's claim amounted to enough to meet the jurisdictional requirements of Sec. 41 (1), Title 28, U. S. C. A. Jurisdiction, therefore, depended upon whether (1) respondents' action was such a class action as to permit aggregation of their claims for jurisdictional purposes, and (2) if such aggregation was permissible only as to certain kinds of such claims, was the aggregate thereof sufficient?

The facts in the record consisting of the respondents' petition and the affidavits used in support of the petitioners' motion to dismiss for want of jurisdiction (R. 39-56) show: that Chicago, St. Paul, Minneapolis and Omaha Railway Company (hereinafter called C. St. P. M. & O.) owns and operates a line of railroad from Omaha, Nebraska northward to Blair, Nebraska, and northward to Sioux City, Iowa, all on the west side of the Missouri River until it crosses the river opposite Sioux City (R. 41); that employees of that Company have seniority on that Company's lines only as the result of collective bargaining (R. 42);

that C. & N. W., so far as this case is concerned, owns lines of railroad in Nebraska, including one from Fremont, Nebraska, eastward to Blair, where it crosses the C. St. P. M. & O., and on across the river to California Junction, Iowa, and northerly on the east side of the Missouri River to Sioux City, Iowa; that the stretch between Blair and California Junction is part of the Nebraska Division of that Company (R. 41); that the C. & N. W. employees, of which respondents are only a few, hold seniority rights only over C. & N. W. tracks on the Nebraska Division as a result of collective bargaining between the Brotherhoods and that Company's management (R. 42); and that respondents have no seniority rights whatever over the portion of the C. St. P. M. & O. tracks between Omaha and Blair (R. 43).

Because of heavy grades over the C. St. P. M. & O. west of the Missouri River, the managements of the two Companies have operated trains primarily carrying C. St. P. M. & O. freight between Omaha and Sioux City running between Omaha and Blair on the C. St. P. M. & O. track and from Blair across the Missouri River to California Junction on the C. & N. W. track, thence north to Sioux City on the east side of the river on the C. & N. W. tracks (R. 43). This operation has been in effect for over six years (R. 43). It gave rise to a complaint by the employees of the C. St. P. M. & O. who had theretofore handled traffic of that Company west of the river, that they were being deprived of work and ought to be allowed to participate in the transportation of C. St. P. M. & O. freight via the new route. The Brotherhoods and the managements of both railroads subsequently agreed that instead of C. & N. W. crews of the Sioux City Division handling all of the traffic on the new route between Omaha and Sioux City, a certain number of crews of the C. St. P. M. & O. should be allowed to operate between Omaha and Sioux City on the new route in pro-

portion as the mileage of the C. St. P. M. & O. was to the mileage of the C. & N. W. tracks on that run (R. 44). These runs are the runs described in respondents' petition as now being sought by respondents as employees of C. & N. W. Nebraska Division, and they are interrailroad runs and not merely interdivisional runs. The agreement referred to in paragraph 12 of respondents' petition was an interrailroad agreement between separate railroads concurred in by the Brotherhoods. It did not affect the relations between the Nebraska Division employees and the Sioux City Division employees, except that Sioux City Division employees, as a part of the new route between Sioux City and Omaha via Blair operated over 7.5 miles of track which was a part of the Nebraska Division of the C. & N. W. between Blair and California Junction (R. 45). But that mileage was continued open to all Nebraska Division employees in handling trains originating upon or destined to the Nebraska Division of the C. & N. W. Notwithstanding these facts, under oath in the Record, paragraph 8 of respondents' petition alleged that the C. St. P. M. & O. tracks between Omaha and Blair are part of the Nebraska Division of the C. & N. W. (R. 10). The Circuit Court of Appeals apparently adopted this unsupported statement as the real fact, notwithstanding it was shown by sworn proof to be untrue. (Affidavits of Nemitz, R. 39; Jones, R. 46; Stephens, R. 54.)

On the record the District Court found (R. 56) that (a) no individual respondent's claim involved the requisite jurisdictional amount, and (b) that the nature of the action was not such as to permit the respondents to aggregate their claims for jurisdictional purposes, and dismissed the action and entered judgment for these petitioners.

Respondents appealed to the Circuit Court of Appeals, which sustained the District Court as to (a) above, but reversed it as to (b), holding that the alleged seniority rights "described in the petition" were "collective rights" suffi-

cient to permit respondents to aggregate such collective claims for jurisdictional purposes, and that upon such aggregation the requisite jurisdictional amount was involved (R. 72-77).

Jurisdictional Statement.

The judgment of reversal by the Court of Appeals was on April 22, 1941. Petition for rehearing denied May 9, 1941. Jurisdiction of this Court to review the decision is claimed under Section 240, Title 28, Par. 347, U. S. Code, Ann.

III.

Questions Presented.

The questions presented are:

1. Whether the District Court was right in dismissing the case for want of jurisdiction.
2. Whether the District Court had jurisdiction of this case.
3. Whether respondents were entitled to aggregate their claims for jurisdictional purposes.
4. Whether the Circuit Court of Appeals erred in holding that aggregation of claims for collective rights could be had for jurisdictional purposes, when the evidence established without dispute that the controversy was over inter-railroad runs as to which no respondent had any seniority or collective right whatever by virtue of the alleged collective agreements or otherwise.
5. Whether the Circuit Court of Appeals erred in holding that the aggregate value of respondents' collective claims was at least equal to the requisite jurisdictional amount and sufficient to give the District Court jurisdiction where respondents did not sustain the burden of proof after the jurisdictional allegations were appropriately challenged.

IV.

Reasons Relied On for Allowance of Writ.

1. The decision of the Circuit Court of Appeals for the Eighth Circuit as to the right of a group of plaintiffs to aggregate their claims for jurisdictional purposes is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of *Central Mexico Light & Power Co. v. Munch*, 116 F. (2d) 85, and *Hackner v. Guaranty Trust Co.*, 117 F. (2d) 95, and in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Atwood v. National Bank of Lima*, 115 F. (2d) 861.

2. The said decision of the Eighth Circuit Court of Appeals as to the existence of jurisdiction in the Federal District Court in an action of the class as defined in Clause (3) of Rule 23 (a) of the Federal Rules of Civil Procedure for the District Courts of the United States, by holding that the several and distinct claims of the various plaintiffs could be aggregated for jurisdictional purposes, is a decision of a Federal question in conflict with the distinction made by the two decisions of this Court rendered on the same day, namely, *Gibbs v. Buck*, 307 U. S. 66, 83 L. Ed. 1111, and *Clark v. Gray*, 306 U. S. 583, 83 L. Ed. 1001, and in conflict with *Hansberry v. Lee*, 311 U. S. 32, 85 L. Ed. 11.

3. The said decision of said Circuit Court of Appeals as to the jurisdiction of the District Court, by holding that respondents' several claims if alleged to be based on "collective" rights can be aggregated for jurisdictional purposes, even though the evidence taken on the jurisdictional question is undisputed that no such collective rights are involved and that only interrailroad runs were involved, and the case is of the "spurious" type of class action, is an erroneous decision of an important question of general law and in conflict with the weight of authority.

4. The said decision of the said Circuit Court of Appeals as to jurisdiction of the District Court by holding that in a "spurious" type of class action the several claims of the plaintiffs could be aggregated for jurisdictional purposes, and in considering the value of collective rights not involved in the controversy, so far departs from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

WHEREFORE, petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket Number 11895 Civil, *Barney E. Gaskill, et al., Appellants, v. Charles M. Thomson, Trustee, etc., et al., Appellees*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated May 31st, 1941.

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Order of Railway Conductors, and

Brotherhood of Railroad Trainmen.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

.Opinion of Court Below.

The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 74) is reported in — F. (2d) —.

.II.

.Jurisdiction.

1. The date of judgment to be reviewed is April 22, 1941. Petition for rehearing was denied May 9th, 1941.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Sec. 240, Judicial Code, Title 28, Sec. 347, U. S. C. A.

3. The Circuit Court of Appeals conceded that no respondent's claim involves the requisite jurisdictional amount (R. 74), (which also seems to be conceded by respondents' Statement of Points on Appeal, R. 61-62), but seemingly on the ground that collective rights as "described in the (plaintiff's) petition" are involved (R. 75), that court held that respondents' claims may be aggregated (R. 74-76). The evidence shows no such collective rights are involved, and that only a "spurious" type of class action is involved here. If the decision is permitted to stand it will be in conflict with the distinction made by this Court in permitting aggregation of claims for jurisdictional purposes in true class actions, as defined in Clause (1) of Rule 23 (a) of said Federal Rules of Civil Procedure, as was permitted by this Court in *Gibbs v. Buck*, *supra*, and in refusing such aggregation in the "spurious" type of class action referred to in Clause (3) of said Rule 23 (a), and as denied by this Court in *Clark v. Gray*, *supra*.

Said decision of said Circuit Court of Appeals is also in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit and for the Sixth Circuit, as referred to in the foregoing petition, in holding that the several claims of plaintiffs may be aggregated for jurisdictional purposes in a "spurious" type of class action.

4. The cases believed to sustain said jurisdiction in this Court to review this case are:

Gibbs v. Buck, supra;

Clark v. Gray, supra;

Gay v. Ruff, 292 U. S. 25, 78 L. Ed. 1099;

KVOS, Inc., v. Associated Press, 299 U. S. 269, 81 L. Ed. 183;

McNutt v. General Motors Accept. Corp., 298 U. S. 178, 80 L. Ed. 1135.

III.

Statement of the Case.

A summary statement is included in the preceding petition under I (pp. 1-6), which is hereby adopted and made a part of this brief. The following additional statement is given (R. 39 to 54):

(See plat, appendix to Brief.)

For operating purposes, the C. & N. W. is separated into the Sioux City Division, which covers the trackage of this railroad alone from Sioux City, Iowa, to California Junction, Iowa, and the Nebraska Division, which covers the trackage of the C. & N. W. alone from California Junction, Iowa, west across the Missouri River to Blair, Nebraska, Fremont, Nebraska, and points west.

The trackage between Blair, Nebraska, and Omaha, Nebraska, is both owned and operated by the C., St. P., M. & O. This trackage between these two points is not a part or portion of either the Sioux City Division or the Ne-

braska Division of the C. & N. W., as such trackage is neither owned by the C. & N. W., nor under its management.

The respondents are all employees of the C. & N. W., and work in the Nebraska Division thereof. The respondents are not now, and never have been, employees of the separate railroad known as the C., St. P., M. & O.

As hereinafter used, the term "interdivisional run" means a run upon the tracks of the same employer covering a part of two operating divisions, i. e., from Blair, Nebraska, on the C. & N. W. tracks in the Nebraska Division, to California Junction, Iowa, thence northerly on the tracks of the C. & N. W. to Sioux City in the Sioux City Division, or vice versa. An "interrailroad run" simply means a train operated by the same crew over the tracks of two separate railroads, i. e., from Omaha, Nebraska, to Blair, Nebraska, over the C., St. P., M. & O., and thence either east over the C. & N. W. tracks to California Junction, or west on the C. & N. W. tracks to Fremont, Nebraska.

In this case the seniority districts of the employees of the C. & N. W. correspond to the operating divisions made and designated by the C. & N. W., i. e., the Sioux City Division of the railroad also constituted the Sioux City Division seniority district, and the Nebraska Division of the C. & N. W. also constituted the Nebraska Division seniority district.

The division of the work on the interrailroad runs involved had previously been settled by agreement between the railroads and the Railway Brotherhoods. This agreement divided these runs between Sioux City Division C. & N. W. employees and employees of C., St. P., M. & O.

The Circuit Court of Appeals, in the opinion filed, stated:

"Our conclusion is that the essential matter in controversy disclosed by the pleadings and the evidence

is the right of the members of the Nebraska Division of trainmen, identified by their membership in that group or class, to perform the work of conductors and trainmen upon the stretch or run of railroad described in the complaint" (R. 74-75).

The "• • • stretch or run of railroad described in the complaint" covered, and the runs in question were inter-railroad runs over, the trackage of the two separate railroads, namely, the trackage between Omaha, Nebraska, and Blair, Nebraska, of the C., St. P., M. & O., and the trackage from Blair, Nebraska, to California Junction, Iowa, of the C. & N. W.

The record is conclusive and without dispute that none of the respondents are employees of C. St. P. M. & O., and that the C. & N. W. did not own or manage the trackage between Blair, Nebraska and Omaha, Nebraska, and that respondents, not being employees of the C., St. P., M. & O., had no seniority rights or any other rights over this line of railroad (R. 39-54).

It is nowhere alleged or claimed in respondents' petition that the C. & N. W., or the two Railroad Brotherhoods, or George Kimball as representative of anyone failed or refused to give plaintiffs recognition for any part of runs on the C. & N. W. tracks which did in fact constitute an inter-divisional run or their proper percentage thereof based upon the mileage on the C. & N. W. tracks in the Nebraska Division thereof. Respondents predicated their alleged right, which they claimed had been denied, not upon the tracks of the C. & N. W. between Blair, Nebraska and California Junction, Iowa, a distance of approximately 7½ miles, which as to C. & N. W. runs is within their seniority district without dispute, but sought to include within their alleged seniority district the trackage of the independent and separate railroad, the C., St. P., M. & O., between Blair, Nebraska, and Omaha, Nebraska.

Respondents were seeking to compel the C. & N. W. and its employees in the Sioux City Division, to grant rights to a mileage percentage over the tracks of a separate and independent railroad system, the C., St. P., M. & O., which obviously neither the management of the C. & N. W., nor the employees of the C. & N. W. in the Sioux City Division, were in a position to control or provide for. Thus respondents' actual objective was to have a mileage percentage of work on the Sioux City Division of the C. & N. W., and to have this computed not upon the mileage operated by the C. & N. W. employees of the Sioux City Division on the tracks of the C. & N. W. in the Nebraska Division, but upon a mileage basis which included approximately 23 miles of track over a separate railroad, to-wit, the tracks of the C., St. P., M. & O. between Blair, Nebraska, and Omaha, Nebraska.

IV.

Specification of Errors.

The said Circuit Court of Appeals erred as follows:

1. In failing to sustain the action of the District Court dismissing the case for want of jurisdiction.

2. In holding that the District Court had jurisdiction of this case.

3. In holding that the respondents were entitled to aggregate their claims for jurisdictional purposes.

4. In basing its opinion on its own misinterpretation of respondents' petition to the effect that the controversy was over interdivision runs over the tracks of the same railroad, and holding as a result that aggregation of claims for collective rights in regard thereto could be had for jurisdictional purposes, when the respondents' petition and the evidence taken on the jurisdictional question established

without dispute that the controversy was over interrailroad runs as to which no respondent had any seniority or collective right whatever by virtue of the alleged collective agreements or otherwise.

5. In holding that the aggregate value of respondents' collective claims were at least equal to the requisite jurisdictional amount and sufficient to give the District Court jurisdiction where respondents did not sustain the burden of proof after the jurisdictional allegations were appropriately challenged.

ARGUMENT.

Summary of Argument.

Point A. Respondents have not sued or asserted any claims as a class and have no common or joint title or interest in the claims of each other. Their action is of the "spurious" type in which aggregation of claims for jurisdictional purposes is not permissible.

Point B. No collective rights of respondents are involved, since the controversy is as to interrailroad, and not merely interdivision runs, and the collective agreements give seniority rights only over railroad runs over the trackage of the contracting railroad employer. Such collective rights could not, therefore, be considered in determining whether respondents' claims could be aggregated for jurisdictional purposes.

Point C. There being no collective rights involved, the value of such rights is nil whether aggregated or not, and respondents failed to sustain the burden of proof on them as to the challenged allegations of jurisdiction.

Point A. Respondents did not sue as a class, sought no relief and asserted no claims for themselves or on behalf of

others as a class. The individual and personal nature of each respondent's cause of action, as distinguished from any assertion of class rights, is clearly shown by such allegations as (a) in Par. 13 of their petition, (R. 6) as to damage, "to each of said plaintiffs herein", (b), in Par. 17, (R. 6), damages "that each have sustained", and (c) in the prayer (R. 7) seeking judgments "in favor of each individual plaintiff for the amount due him."

Other than as to their "collective rights", on which the Circuit Court of Appeals relied so heavily, and which will be subsequently discussed, there are no claims asserted in which the respondents claim any common interest or title. The only community of interest is in the common questions of law or fact affecting their several rights, and in the similar relief which each respondent seeks. Such an action, if a class action at all, is only one of the "spurious" type covered by Clause (3) of Rule 23 (a) of the Federal Rules of Civil Procedure for the District Courts of the United States, Title 28; following Sec. 723 (c), U. S. C. A.

As Judge Clark of the Second Circuit Court of Appeals said in *Hackner v. Guaranty Trust Co.*, 117 F. (2d) 95:

"The interests of all are in common and involve a common question of law and fact. The prayer for relief was for an accounting, damage for the loss sustained by all noteholders. . . . The sole question is whether or not the amount in controversy exceeds, exclusive of interest and costs, \$3,000.00. . . . Aggregating to make up the jurisdictional amount is permitted only when the claims are of a joint nature, as when it is sought to enforce a single title in which the plaintiffs have a common interest. . . . A class could be found only in the 'spurious' sense (See 2 Moore's Fed. Practice, 2241), that a common question of law and fact was involved. Among parties so related aggregation is improper. . . ."

The Eighth Circuit Court of Appeals, in holding that this case was controlled by *Gibbs v. Buck*, *supra*, seems to have

erroneously assumed (1) that the respondents were all the conductors and brakemen working for the C. & N. W. in its Nebraska Division and that all had a common interest in this litigation, (the Court says (R. 76) the plaintiffs "constitute the class"), and (2) that the particular operating division of that railroad was analogous to ASCA in the *Gibbs v. Buck* case.

That there are other conductors and brakemen working in said operating division with higher seniority rank, is shown by the seniority numbers listed in respondent's affidavits (R. 25 to 35). It necessarily follows that others in that Division having greater seniority than these respondents, and hence having attractive runs over C. & N. W. trackage secure from encroachment by employees of other railroads, are not interested in or desirous of having the respondents' succeed in the litigation, which might permit the employees of another railroad to assert seniority rights over C. & N. W. trackage.

The Division involved is not the local subdivision of the Brotherhoods, but the operating division of the railroad which, unlike ASCAP, is not an organization of the employees working therein and has no officers, activities or functions in that regard. This Division neither collects nor distributes moneys for such employees, and none of them has any common interest or title in what any other employee receives, and none is asserted. The only relation of respondents to this Division is that they work therein and their seniority rights are confined to C. & N. W. runs over C. & N. W. trackage in that Division.

The respondents are merely a part of a group working for the same employer in the same State and under the same form of employment agreement. In seeking a common immunity from an alleged restriction on their means of earning a livelihood, they are in exactly the same situation as the plaintiffs in *Clark v. Gray, supra*, in that "there are numerous plaintiffs having no joint or common interest or

title in the subject matter of the suit", and hence whose "only community of interest is in questions of law or fact." In such a situation, the rule of *Clark v. Gray, supra*, as it is now being applied by the other Circuit Courts of Appeal in *Central Mexico Light & Power Co. v. Munch, supra*, *Hackner v. Guaranty Trust Co., supra*, and *Atwood v. National Bank of Lima, supra*, is the correct rule. See also, "*Class Suits and the Federal Rules*", by Prof. Lesar, 22 Minn. Law Review, 34; *Kvos, Inc. v. Associated Press, supra*; *McNutt v. General Motors Accept. Corp., supra*; *Stucker v. Roselle*, 37 F. Supp. 864.

Point B. The Eighth Circuit Court of Appeals, in holding that the foregoing principles did not apply, and that the rule in *Gibbs v. Buck, supra*, did apply, relied on its own misinterpretation as to "collective rights" being involved. But for its erroneous concept of the controversy involved, there would have been no collective rights for the Circuit Court of Appeals to have considered in holding that the respondents had such a community of interest in the controversy as to permit them to aggregate their claims for jurisdictional purposes.

That court said the controversy was over the right of the C. & N. W. Nebraska Division employees "to perform the work of conductors and trainmen upon the stretch or run *described in the complaint*". (Italics ours), (R. 75), and that "the reason for its (the C. & N. W.'s) refusal of work to the plaintiffs is that another Division of trainmen and not the Nebraska Division is entitled" (R. 75-76).

Since it is established by the record as a fact (R. 39 to 54) that the tracks of the C. & N. W. do not run between Blair, Nebraska, and Omaha, Nebraska, and such tracks are not under the jurisdiction of the management of the C. & N. W., or the employees of the C. & N. W. in either the Sioux City Division or the Nebraska Division, and respondents are not employees of the C. St. P. M. & O., it is

at least clear that respondents could have no collective right to perform the work " . . . upon the stretch or run of railroad described in the complaint." "The . . . stretch or run of railroad described in the complaint" was from Omaha, Nebraska, to Blair, Nebraska, over the C. St. P. M. & O., and from Blair, Nebraska to California Junction, Iowa, over the C. & N. W. None of the employees of the C. & N. W. had any seniority rights on the trackage of the foreign road between Blair, Nebraska and Omaha, Nebraska, irrespective of whether they were of the Nebraska Division or the Sioux City Division of the C. & N. W.

Respondents do not allege in their complaint that the C. & N. W. has denied to them or any employee of the Nebraska Division offsetting runs on the Sioux City Division equal to the runs made by Sioux City Division men over the 7.5 miles between Blair and California Junction, so there is no occasion to consider that mileage alone in calculating the jurisdictional amount.

On the contrary, respondents have limited the controversy to a complaint against the distribution of interrailroad runs resulting from the agreement between the Brotherhoods and the managements of both railroads, as stated in Paragraph 12 of the complaint (R. 5). Obviously, employees of the Nebraska Division as a whole, and as represented by the Brotherhoods in this suit, are more vitally concerned with the protection of their seniority on C. & N. W. rails as against employees of some other railroad such as the C. St. P. M. & O. than they are in the success of these individual respondents in their attack upon the interrailroad agreements made with the managements of those two railroads. The interests of the employees of the Nebraska Division of the C. & N. W. as a whole are therefore potentially conflicting with the interests of these individual respondents in their attack upon the said interrailroad agree-

ments. This presents a situation similar to that found in *Hansberry v. Lee*, 311 U. S. 32, 85 L. Ed. 11.

These interrailroad runs have nothing whatever to do with respondents' collective rights as to seniority over C. & N. W. runs solely on C. & N. W. trackage, which is the only seniority given to respondents by the collective agreements referred to in their petition. *Shaup v. Grand International Brotherhood of Locomotive Engineers*, 223 Ala. 202, 135 So. 327; *Ryan v. New York Central*, 267 Mich. 202, 255 N. W. 365; *Geo. T. Ross Lodge No. 831, et al. v. B. R. T.*, 191 Minn. 373, 254 N. W. 590: "*Seniority Rights Under Labor Union Working Agreements*" by Prof. Christensen, 11 Temple Quarterly, 355.

The result of a failure to apply such limitations to the rights here asserted can be traced as follows:

(1) Neither the runs themselves nor work in the C. & N. W. Sioux City Division on a mileage percentage basis, can be given to two different groups of workers at the same time for the same runs over the same trackage.

(2) C. & N. W. Sioux City Division employees, by virtue of the agreement between the railroads and the Railway Brotherhoods referred to in paragraph 12 of respondents' petition, already are giving to C. St. P. M. & O. employees work on, or allowing a mileage percentage for these runs based on, the 23 miles between Blair and Omaha.

(3) To give such work or a similar mileage percentage to C. & N. W. Nebraska Division employees without ceasing to give such to C. St. P. M. & O. employees would constitute a double payment by C. & N. W. Sioux City Division employees for the same operation.

(4) Thus, if such work or mileage percentage is obtained by C. & N. W. Nebraska Division employees, such must al-

most certainly be done at the expense of the C. St. P. M. & O. employees, and they are not even parties to this litigation.

(5) If anyone has any seniority as to the portion of these runs between Omaha and Blair, it is the C. St. P. M. & O. employees.

(6) The net effect of the Circuit Court's straining to find and recognize collective rights is to completely ignore and eventually destroy the principal collective right which is affected in any way by this controversy.

Point C. The only "values" which the Circuit Court of Appeals held could be aggregated was "the value of the aggregate rights of all the members of the Nebraska Division to be allotted work while the alleged contracts (the collective agreements) continued. * * *" (R. 75). In other words, that court would permit aggregation but limit it to the value of the collective rights involved.

The statement of the court quoted above would seem to mean that the railroad was refusing to recognize that the Nebraska Division employees had any seniority rights whatever under the collective agreements. There was no controversy as to the existence of collective agreements or as to respondents' rights to be allotted work over C. & N. W. trackage, in accordance with seniority established by such agreements. None was alleged in respondents' petition or established by the undisputed evidence.

As seen before, no "collective rights" whatever were involved, since no seniority over interrailroad runs is given by such collective agreements. With no collective rights involved, there cannot be said to be a value involved as to such collective rights equal to the jurisdictional amount, whether aggregated or not. Each respondent's "collective right" in the controversy is nil, and its value, therefore, is necessarily zero.

Although there is no evidence whatever in the record as to the term or duration of any "right" to any run, the Circuit Court, after noting that the values of such rights were for "while the alleged contracts continued" (R. 75), also says that such value "for the life of the contracts will greatly exceed \$3,000.00" (R. 75). Section 6 of the Railway Labor Act, Section 156, Title 45, U. S. C. A. provides a means whereby, on thirty days' notice "of an intended change in agreements affecting rates of pay, rules or working conditions" such may be altered. The Nemitz affidavit (R. 39 to 45) established that the way in which these runs were divided was altered by such a means. It would seem that this alone should suffice to cause the continuance of any "right" in the respondents to have been terminated. At least, it shows that respondents have failed to show what was the life of the right which they claim to have had to the runs either prior to or subsequent to their reallocation, as testified to by Nemitz. It would therefore seem that the Circuit Court has supplied an essential element of fact in favor of the respondents concerning which there is no support in the record whatever, and which is a necessary part of that proof on which they have the burden.

With both courts (and also apparently the respondents) agreeing that no individual respondent has established the requisite jurisdictional amount, and with such a showing as to the only type of claim which the Circuit Court of Appeals holds can be aggregated, and no showing as to the duration or existence of even the very right on which respondents base their claims, it is apparent that respondents have failed to sustain the burden of proof as to jurisdiction. In *Kvos, Inc. v. Associated Press*, *supra*, this Court said:

"The petitioner's motion was an appropriate method of challenging the jurisdictional allegations of the complaint. It did not operate merely as a demurrer, for

it did not assume the truth of the bill's averments. . . . On the contrary the motion traversed the truth of the allegations as to the amount in controversy and in support of the denial recited facts dehors the complaint. . . . The motion required the trial court to inquire as to its jurisdiction before considering the merits, . . . Where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof. . . . And in such inquiry complainant had the burden of proof." °

Certainly, here, as in *McNutt v. General Motors Accept. Corp., supra*, the following applies:

"It is the duty of the Court when it shall appear to its satisfaction that the suit does not really and substantially involve the necessary amount to give it jurisdiction, to dismiss the same, and this the Court may do whether the parties raise the question or not. In the present case the issue was raised by answer, and, therefore, it became necessary for the Court to determine the question of jurisdiction upon the facts presented. . . ."

Conclusion.

It was not respondents' collective rights under the collective agreements which were involved. The only controversy was over the division of interrailroad runs which do not involve the seniority created by the collective agreements. The claims as to these interrailroad runs are separate and distinct to each respondent and adverse to others in their railroad Division, and no one respondent has any common or joint interest or title in the claim of any other respondent. A joint action to enforce such claims as they might have to the interrailroad runs is one as defined in Clause (3) of Rule 23 (a) of said Federal Rules of Civil Procedure, which is the "spurious" type, and as to which aggregation of

claims for jurisdictional purposes is not permissible. The District Court, therefore, correctly sustained these petitioners' motions to dismiss respondents' petition, and the Circuit Court of Appeals erred in reversing the judgment for these petitioners.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing such decision of said Circuit Court of Appeals.

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